INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	8
Appendix	10

CITATIONS

Cases:	
Chapman v. *United States*, 365 U.S. 610	8
Chin Kay v. *United States*, 311 F. 2d 317	7
Clay v. *United States*, 246 F. 2d 298	7
Johnson v. *United States*, 333 U.S. 10	8
Jones v. *United States*, 362 U.S. 257	5
Monnette v. *United States*, 299 F. 2d 847	7

718-986—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GIACOMO VENTRESCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit reversing respondent's conviction for possessing and operating an illegal distillery and for conspiracy to do so.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 10–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on November 26, 1963. The time to file a petition for a writ of certiorari was extended by order of Mr. Justice Clark, dated December 24, 1963, to and including January 25, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In an affidavit for a search warrant which on its face showed that Investigators of the Alcohol and Tobacco Tax Division had conducted a month-long investigation and had made personal observations of many suspicious circumstances, the affiant stated at the outset that his belief that the house contained a still was based upon personal observations, information received from other Investigators of the Division, "and reports orally made to me describing the results of their observations and investigation". The court below held that the use of the word "investigation" indicated that the information set forth in the affidavit, or some of it, might have come from informants of unknown reliability (even though this inference is negated by the concluding sentence of the affidavit) and that therefore the affidavit did not show probable cause. The question presented is whether this technical and restrictive reading of the affidavit constitutes such a misapprehension of the judical function in reviewing the sufficiency of an affidavit for a search warrant, contrary to the views of other circuits, as to call for corrective action by this Court.

STATEMENT

Petitioner's conviction in the United States District Court for Massachusetts for possessing and operating an illegal distillery was reversed by the Court of Appeals for the First Circuit (one judge dissenting) on the ground that the affidavit for a search warrant, pursuant to which the still was found, was insufficient to establish probable cause. The affidavit is repro-

duced in full in the opinion of the court of appeals (App. *infra*, pp. 11–15).

The affidavit was made and submitted to a Commissioner on August 31, 1961, by Walter Masaka, an Investigator for the Alcohol and Tobacco Tax Division. He stated that he had reason to believe that an illegal distillery was in operation on Ventresca's premises at 148½ Coburn Avenue in Worcester, Massachusetts. The grounds for belief were set forth in a sheet attached to the affidavit. The sheet begins with the statement:

> Based upon observations made by me and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

The affidavit then sets forth seven different occasions, at specific times on specific dates between July 28 and August 30, 1961, when a Pontiac car owned by one Garry, with Garry driving and one Incardone as a passenger, was seen to have been driven into the yard at the rear of the premises in question, either heavily laden (August 7, 1961) or with identified loads of sugar (July 28, August 7, August 16, August 24) or tin cans (August 11, August 28). On some dates (July 28, August 7, August 11) it was reported that Garry and Incardone had been seen loading Garry's car. It was also reported that on August 16 and August 24, at about midnight, Garry was seen to arrive at the place where he lived and remove five-

gallon cans from the trunk of his car; and that Incardone made a number of trips to carry the cans into Garry's home, two at a time. On August 28, after Garry and Incardone had delivered empty cans to Ventresca's premises, other cans were placed in the trunk of Garry's car. The affidavit states that the "manner in which the cans were handled, and the sounds which were heard during the handling of these cans, were consistent with that of cans containing liquid." The persons making these various observations were not specified.

The affidavit contains two additional paragraphs alleging that on specified dates, August 18 and August 30, "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of the premises at 148 Coburn Avenue. As to August 30, it was reported that "they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue."

The sheet concludes:

> The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

The district court upheld the validity of the warrant on a motion to suppress. The court of appeals held the warrant insufficient because the affiant's belief was based in part on reports of other Investigators' observations and *investigation*. From use of the term "investigation", the court inferred that the

observations described in the seven paragraphs summarized above might have been made by informants of unknown reliability, and that:

> With the exception of two paragraphs in the factual recitation alleging that unidentified "Investigators" smelled the odor of fermenting mash in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through investigation. [App., p. 18.]

Because the affiant could not vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators and described under the generic term "investigation", the court of appeals found no substantial basis for crediting whatever information may have been hearsay, and concluded that under *Jones* v. *United States,* 362 U.S. 257, probable cause had not been established.

REASONS FOR GRANTING THE WRIT

The Solicitor General seeks certiorari in this small and intrinsically unimportant case because of a conviction that upholding the activities of law-enforcement agencies which have scrupulously observed the established procedure for safeguarding constitutional rights and satisfying the substantial requirements for a search warrant is no less important to the administration of justice than the invalidation of convictions because of disregard for individual rights or official overreaching. By an unduly technical and clearly erroneous interpretation of the affidavit upon which the search warrant was issued, the decision

below defeats substantial justice in the conduct of a criminal proceeding.

1. On any fair reading, it is plain that the affidavit cannot be said to embody unreliable hearsay. It is true that the affiant in his initial statement referred to his personal observations and the results of "observations and investigation" by his fellow officers. However, his concluding statement was that the information was based "upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." The term "Investigators" means only regular full time government employees. When the two statements are read in conjunction with the detailed specifications of time and place and the other detailed allegations showing that the same car was observed at different locations and sometimes followed, there can be no doubt that the affidavit reflected the personal observations of a number of Investigators of the Division, rather than observations made by unknown informants. Moreover, even if it could be assumed (which we dispute) that some of the detailed observations recounted in the affidavit could fairly be regarded as having come from persons other than investigators, we submit that information given with the kind of specificity shown in this affidavit would be entitled to credence. This is particularly true when the information is corroborated by observations which are indisputably those of the government's investigators (see point 2, *infra*). Certainly, it has never been the rule that a affidavit supporting a search warrant—a docu-

must normally prepared by a non-lawyer—is to be read like a common law pleading or that a determination of probable cause is to be made in disregard of the practicalities of everyday living and of law enforcement.

2. The warrant is independently sustained by the allegations that the government's investigators smelled the odor of fermenting mash on two occasions and heard the noise of machinery emanating from petitioner's residence. To conclude in such circumstances that the affidavit was defective is to reach a result in direct conflict with *Monnette* v. *United States*, 299 F. 2d 847 (C.A. 5), which held that the distinctive odor of fermenting mash is alone sufficient to justify issuance of a warrant to search a dwelling.[1]

[1] To the extent (as suggested in the concurring opinion below) that the decision holds that the affidavit will fall if any of its averments are insufficient to support the warrant, it conflicts with decisions in other circuits. There is clear authority in the Fifth and Ninth Circuits that if an affidavit contain *any* facts sufficient to establish probable cause, the warrant should be upheld. *Clay* v. *United States*, 246 F. 2d 298 (C.A. 5, 1957); *Chin Kay* v. *United States*, 311 F. 2d 317 (C.A. 9, 1962). Even assuming that some or even all of the seven paragraphs setting forth observations made by persons not specifically identified as "Investigators" may contain information received from unofficial informants, this fact would not invalidate the warrant if the affidavit recites other facts establishing probable cause. Here the allegations deemed unsatisfactory failed to justify the warrant, in the view of the majority below, only because of its construction of the words "and investigation." Surely the presence of an ambiguity in parts of an affidavit is not sufficient reason for refusing to consider the remainder.

718-000—64——2

Two decisions of this Court also indicate that such a suspicious odor traced to a residence will support issuance of a warrant. *Johnson* v. *United States*, 333 U.S. 10 (odor of narcotics); *Chapman* v. *United States*, 365 U.S. 610 (odor of mash). Notably, those decisions condemned hasty action by officers who invaded premises immediately on the basis of telltale odors, indicating that the proper course was to obtain a search warrant. That is precisely what the officers did in the instant case. Here, the investigators did not act hastily; they conducted a lengthy and thorough investigation; they procured a search warrant on the basis of detailed allegations. Nonetheless, this conviction has been set at naught.

CONCLUSION

Despite the apparent conflict among the circuits, we find the need for review not in any question of legal doctrine but in the importance of making it plain that the activities of law-enforcement officials are not to be invalidated by hypertechnical requirements where they have carefully followed the constitutional and statutory procedure for conducting a search and have scrupulously observed every substantial right of the persons suspected. The Court has been alert to invalidate improper searches and seizures and has often stressed the importance of obtaining a search warrant. Such decisions not only protect individual liberty but strengthen the administration of justice by promoting respect for law on the part of law-enforcement officers. The other side of that

coin is the need for emphasizing substantial justice when law-enforcement officers conscientiously follow the proper course. Cavilling over the meaning of a single word when the sense is plain, or disregarding allegations which fully justify the warrant because others, taken alone, are arguably insufficient, gives rise to a sense of frustration and, more importantly, derogates from the goal of building a system of law enforcement sensitive both to the needs of the community and the demands of individual liberty.

This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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Solicitor General.
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JANUARY 1964.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6157

GIACOMO VENTRESCA, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges*

Opinion of the Court

November 26, 1963

HARTIGAN, *Circuit Judge.* The defendant, Giacomo Ventresca, appeals from a judgment of conviction of the United States District Court for the District of Massachusetts for possessing and operating an unlawful still in violation of the Internal Revenue Code and for conspiracy to do so.[1]

The defendant was arrested in his home on September 1, 1961 by Investigators attached to the Alco-

[1] The defendant was convicted on an eight count indictment for violation of 26 U.S.C. §§ 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, 5681(a) (1958) and on a one count indictment for violation of 18 U.S.C. § 371 (1958).

hol and Tobacco Tax Division of the Internal Revenue Service who were executing a warrant to search for an illicit still. The Investigators found and seized a still, along with other apparatus used in the distilling process and a large quantity of non-tax paid liquors. Some of the seized objects were introduced in evidence against the defendant at the trial.

Prior to trial the defendant filed a motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant. After receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States,* 362 U.S. 257 (1960). Further, the court ruled that the facts in the affidavit constituted probable cause and the warrant described the things to be seized with sufficient particularity. Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. R. of Crim. P.

The principal question raised by the defendant is the sufficiency of an affidavit signed by one Walter A. Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in the margin.[2] It alleged in substance that Mazaka had "reason to believe" that

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[2] "AFFIDAVIT FOR SEARCH WARRANT

"BEFORE W. ARTHUR GARRITY, WORCESTER, MASSACHUSETTS

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house

an illicit still and other material used in the manufacture of non-tax paid liquors were being concealed on the premises of a dwelling house located at 148½ Coburn Avenue, Worcester. On an attached sheet

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located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors, which are being held and possessed, and which have been used and are intended for use in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602, and 5686.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"See Attached Sheet

(s) Walter A. Mazaka
Investigator, Alcohol and
Tobacco Tax Div.,
Internal Revenue Service

"Sworn to before me, and subscribed in my presence, August 31st, 1961

(s) W. Arthur Garrity
United States Commissioner

"Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

"On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten bags were put into the trunk, and three

signed by Mazaka were recited the "facts tending to establish the foregoing ground for issuance of a Search Warrant."

'were placed in the rear seat. Those in the rear seat were marked 'Domino.' The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the car with its contents was driven in the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

"On August 2, 1961 a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at 148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

"On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between the two houses.

"On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

"On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the

The first paragraph of the attached sheet contained the following:

"Based upon observations made by me, and based upon information received officially from

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same night, the Pontiac driven by Garry with Incardone as a passenger was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few moments. Incardone then drove away, and Garry went into his home.

"On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

"An August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

"About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car. Garry opened the trunk, and then entered his house. From the trunk of the car there was removed eleven five-gallon cans which appeared to be filled. In-

other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made."

There followed eleven paragraphs of stated facts, nine of which detailed the activities of two men alleged to have been seen riding around in a 1961 Pontiac auto-

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cardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

"On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave., they met Giacomo Ventresca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that empty metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later, new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sounds which were heard during the handling of these cans, were consistent with that of cans containing liquid.

"On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

(s) WALTER A. MAZAKA"

mobile and making seven individual deliveries of sugar and five-gallon cans to the dwelling house at 148½ Coburn Avenue, Worcester. Two of the paragraphs recited that on three separate occasions "Investigators" smelled an odor of fermenting mash in the immediate vicinity of the suspected dwelling.

The final paragraph of the attached sheet comprised this statement:

> "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."

The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon "personal knowledge and information," it is stated that such "personal knowledge and information" was obtained from other Investigators.

The finding of probable cause as the basis for issuance of a search warrant is made by the Commissioner from the facts stated in the affidavit when that is the only evidence presented. *Siden* v. *United States,* 9 F. 2d 241 (8th Cir. 1925). Such a duty cannot be delegated to the accuser. *United States* v. *Harnich,* 289 Fed. 256 (D.Conn. 1922). Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay.

That is not to say that an affidavit dependent upon of hearsay could not support issuance of a search warrant. The Supreme Court in *Jones* v. *United States, supra* at 269, has succinctly stated the law in this respect:

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented."

In *Jones,* the source of the hearsay, the informant, had direct knowledge himself of the possession of contraband articles by the suspect. He was deemed worthy of credence because he had previously given accurate information, his story was corroborated by other sources of information, and the suspect was known to the police as a narcotics user. The Court said at 271:

> "Thus we may assume that [the affiant] Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the informant's story." (Emphasis supplied).

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Where the hearsay evidence has been personally observed by federal officers and communicated directly to the affiant, courts have found a substantial basis for crediting the hearsay. In *United States* v. *McCor-*

mick, 309 F. 2d 367 (7th Cir. 1962), cert. den., 372 U.S. 911 (1963)—a case the government contends "appears to be on all fours" with the instant case—the affiant had no personal knowledge of the averments in the affidavit, but each factual statement was prefaced by the declaration that the F.B.I. agents from whom the information was received were "present" and "observed" each described event as it occurred. In *Giacona* v. *United States,* 257 F. 2d 450 (5th Cir.), cert. den., 358 U.S. 837 (1958), the affiant was without personal knowledge but identified his informant as one W. T. Finley of the Federal Bureau of Narcotics who had personally observed the narcotics hidden under the building to be searched.

But the holdings in the aforementioned cases are inapplicable to the facts of this case. With the exception of two paragraphs in the factual recitation *alleging that unidentified "Investigators" smelled the odor of fermenting mash* in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through "investigation."

Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit

alone, but the distinct possibility of hearsay-upon-hearsay.

Hearsay information received from an informant may be used in an affidavit to secure a search or arrest warrant only when the informant is shown to be "trustworthy," *Monnette* v. *United States,* 299 F. 2d 847 (5th Cir. 1962), or "reliable," *Draper* v. *United States,* 358 U.S. 307 (1959). In *United States* v. *Pearce,* 275 F.2d 318 (7th Cir. 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient. The affiant, an F.B.I. agent, had received his information from his superior, who in turn had received it from an F.B.I. agent in Seattle, who in turn had received it from a reliable informer. The court pointed out, therefore, that the statement in the affidavit that the affiant obtained the information from "a source which in the past has proved reliable" was obviously false. Similarly here, the affiant, Mazaka, could not truthfully vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators. The substantial basis for crediting the hearsay found in *Jones* is nowhere apparent in this case.

Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is direct or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant. See *DiBella* v. *United States,* 284 F.2d 897 (2d Cir. 1960), rev'd on procedural grounds, 369 U.S. 121 (1962). It follows that the evidence obtained as a result of such search should have been suppressed.

If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their corroboration. And where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient.

Judgment will be entered vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with this opinion.

ALDRICH, *Circuit Judge,* (concurring). This is a case of *general importance.* As a matter of interpretation I cannot agree with the first paragraph of Judge WOODBURY'S dissent. While I do agree with the first sentence of the second paragraph, it does not lead me to his result. The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a pro forma matter. *Marron* v. *United States,* 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events prove it was right after all. *Byars* v. *United States,* 1927, 273 U.S. 28. I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the

personal observation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic coverall.

Such a prinicple is peculiarly appropriate here because if a warrant is to be predicated primarily upon an odor, it is highly desirable that proper weighing may be made of the attendant circumstances. *Cf. Johnson* v. *United States,* 1948, 333 U.S. 10, 13.

WOODBURY, *Chief Judge* (dissenting). In the light of the first and more particularly of the final paragraphs of the sheet attached to Mazaka's affidavit, quoted at length in footnote 2 of the opinion of the court, I would read the statements of fact contained therein as based upon "observations" made either by the affiant himself or by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Since knowledge obtained from other federal law enforcement agents, though hearsay, has sufficient verification to support the issuance of a search warrant under the rule of *Jones* v. *United States,* 362 U.S. 257 (1960), see *United States* v. *McCormick,* 309 F. 2d 367 (C.A. 7, 1962), *cert. den.* 372 U.S. 911 (1963), it can make no difference which specific "observations" were made by the affiant himself and which were made by other Investigators and reported in line of duty to the affiant.

But, regardless of the foregoing, the allegations of the detection of the odor of fermenting mash emanating from Ventresca's house on three occasions, twice between four and five o'clock on the morning of August 18, 1961, and once at about four o'clock on the morning of August 30, 1961, are clear allegations of actual observations made by Investigators

themselves and not observations relayed to them by someone else whose identity does not appear. These allegations read in conjunction with the others impress me as enough to warrant issuance of the search warrant by the Commissioner. See *United States* v. *Parham*, 17 F.R.D. 301 (E.D.Mich. 1955). I would affirm.

JUDGMENT

November 26, 1963

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court for a new trial consistent with the opinion filed this day.

By the Court:

/S/ ROGER A. STINCHFIELD.

Approved:

/S/ PETER WOODBURY

Ch. J.

U.S. GOVERNMENT PRINTING OFFICE: 1964